Filed 6/13/07 In re Alfredo E. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re ALFREDO E., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. ALFREDO E., Defendant and Appellant.	E040018 (Super.Ct.No. RIJ109771) OPINION

APPEAL from the Superior Court of Riverside County. Martin H. Swanson, Commissioner. Affirmed as modified.

David L. Bernstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General and Keith Lollis, Deputy Attorney General, for Plaintiff and Respondent.

FACTS AND PROCEDURAL HISTORY

On February 16, 2006, defendant was convicted of attempting to rob a fellow student at school. (Pen. Code, §§ 664 & 211, a felony.)[1] At the time of the attempted robbery, January 10, 2006, defendant was on a one-year grant of probation under a deferred entry of judgment for being in possession of a knife at school nine months earlier. (§ 626.10, a felony.) On March 3, 2006, the juvenile court sentenced him to 53 to 106 days for the two offenses, granted him credit for 53 days time served, and released him to the custody of his aunt on terms and conditions. One of the terms was that he, "Not associate with anyone who has possession of weapons of any kind, including but not limited to: firearms, firearm facsimile, nunchakus, martial arts weaponry, and knives." At sentencing, defendant did not object to any of the terms.

DISCUSSION

Defendant argues on appeal that the probation condition requiring him not to associate with anyone who has possession of weapons is unconstitutionally vague and overbroad. The Attorney General replies first that defendant forfeited the opportunity to challenge the term by failing to object below. Alternatively, the Attorney General recommends a modification of the wording of the term different from the one defendant suggests: defendant should not to associate with anyone "*who he knows possesses* weapons of any kind…."

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[1] All further statutory references are to the Penal Code.

Forfeiture:

The recent California Supreme Court case of *In re Sheena K.* (2007) 40 Cal.4th 875 (*Sheena K*), has settled the Attorney General's first argument.

Failure to timely challenge a probation condition in the trial court generally forfeits the claim for purposes of appeal. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293 (*S. B.*); *People v. Williams* (1997) 16 Cal.4th 153, 250; *People v. Welch* (1993) 5 Cal.4th 228, 233-234 (*Welch*); *In re Josue S.* (1999) 72 Cal.App.4th 168, 170.) As has long been established, the purpose of the rule is to encourage parties to bring errors to the attention of the trial court so that they may be corrected at the time they are made rather than to remain silent in hopes of prevailing on appeal. (*Sommer v. Martin* (1921) 55 Cal.App. 603, 610; *S.B.*, *supra*, at p. 1293; see also Cal. Evid. Code, § 353, com.) The *Welch* rule has been held to apply to juvenile cases and to constitutional questions, including vagueness and overbreadth claims, unless some exception applies to excuse the failure to object. (*S.B.*, *supra*, at p. 1293; *In re Justin S.* (2001) 93 Cal.App.4th 811, 814 (*Justin S.*); *In re Abdirahman S.* (1997) 58 Cal.App.4th 963, 970; *In re Josue S.*, at pp. 171-172; *People v. Gardineer* (2000) 79 Cal.App.4th 148, 151-152.) An exception to the forfeiture rule may be found when the appeal presents an important issue of law and the error is easily remediable on appeal by modification of the probation condition. (*S.B.*, *supra*, at pp. 1293-1294.)

In *Sheena K.* the high court declined to extend the *Welch* rule to overbreadth and vagueness claims like defendant's that do not depend for their resolution on the facts of

the case. "An obvious legal error made at sentencing that is 'correctable without referring to factual findings in the record or remanding for further findings' is not subject to forfeiture. [Citations.]" (*Id.* at p. 887.) Specifically, "[A] facial challenge to the terms of a probation condition on constitutional ground of vagueness and overbreadth" is not subject to the rule. (*Id.* at pp. 887-888, fn 7.)

As with the claim in *Sheena K.*, "Defendant's challenge to [his] probation condition as facially vague and overbroad presents an asserted error that is a pure question of law, easily remediable on appeal by modification of the condition." (*Id.* at p. 888.) It does not depend for its resolution on the facts of his case. Therefore his claim has not been forfeited.

Vagueness:

Having determined that the *Sheena K.* defendant's claim was appealable, the Court went on to analyze whether the disputed term violated the void-for-vagueness doctrine. The term in question in *Sheena K.* required the defendant "not [to] associate with anyone disapproved of by [her] probation [officer]." (*Id.* at p. 878.) Because the *Sheena K.* defendant could not know in advance which persons her probation officer had disapproved, in the absence of "an express requirement of knowledge," the Court concluded that the term must be modified to render it constitutional. (*Id.* at pp. 878, 891-892.) The Court further suggested an amendment to form probation orders: "In the interest of forestalling future claims identical to defendant's based upon the same language, we suggest that form probation orders be modified so that such a restriction

explicitly directs the probationer not to associate with anyone 'known to be disapproved of' by a probation officer or other person having authority over the minor." (*Id.* at p. 892.)

Defendant argues in his supplemental letter brief that the term in the present case, that he not associate with anyone who has possession of weapons of any kind, including but not limited to: firearms, firearm facsimile, nunchakus, martial arts weaponry, and knives, does not differ in any material way from the term at issue in *Sheena K.* To avoid vagueness, he asserts, the term must contain a personal knowledge provision and should be modified to read "Not [to] associate with [anyone] *known to him* to possess weapons . . . ." The Attorney General believes defendant's suggested wording is "too broad" and asks that the modification read: "Not to associate with anyone *who he knows possesses* weapons of any kind . . . ."

We cannot see any way in which the two suggested wording changes meaningfully differ, but we do find the Attorney General's active-voice alternative grammatically preferable. Therefore, we will modify the disputed term by using "who he knows possesses" rather than "known to him to possess."

DISPOSITION

The term of defendant's probation agreement reading "Not associate with anyone who has possession of weapons of any kind, including but not limited to: firearms, firearm facsimile, nunchakus, martial arts weaponry, and knives" is modified to read "Not associate with anyone who he knows possesses weapons of any kind, including but

not limited to: firearms, firearm facsimile, nunchakus, martial arts weaponry, and knives."

The judgment is affirmed as modified.

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RAMIREZ
P.J.

We concur:

McKINSTER
J.

RICHLI
J.